

Celotex Corporation -- Proposed Compliance Order
Pursuant to Section 113(a)(3) of the Clean Air
Act--REQUEST FOR CONCURRENCE

Gerald M. Hansler, P.E.
Regional Administrator

MAY 1975

168345



Robert L. Baum
Deputy Assistant Administrator for
General Enforcement (EG-339)

A. Facility Alleged to be In Violation:

Celotex Corporation, Market and Herbert Streets, Perth Amboy, New
Jersey 08861

B. Regulation Alleged to be Violated:

Volume 40 CFR §61.22(c)(7), a regulation promulgated pursuant to
Section 112(b)(1)(B) of the Clean Air Act, as amended, declares that there
shall be "no visible emissions to the outside air" incidental to the
manufacture of paints, coatings, caulks, adhesives, or sealants containing
commercial asbestos. "Outside air" is defined in 40 CFR §61.21(e) to mean
"the air outside buildings and structures."

Provisions are made in 40 CFR §61.22(f) for an alternative means of
complying with the terms of the standard set at 40 CFR §61.22(c)(7); that
alternative involves the installation of an air cleaning device which satis-
fies the requirements of 40 CFR §61.23. The Regional Office has found, on
the basis of evidence to be set out and discussed at length below, that the
asbestos paint manufacturing operation of the Celotex Corporation's Perth
Amboy facility is in violation of the "no visible emissions" standard of 40
CFR §61.22(c)(7), and does not meet the alternative equipment standard of
40 CFR §61.22(f).

C. Background of Alleged Violation:

On May 13, 1975, two engineers from the Air Facilities Branch (AFB)
of the Facilities Technology Division, Region II US. EPA visited the
Celotex Corporation's Perth Amboy, New Jersey facility in connection with
AFB's continuing program of source surveillance. This visit followed AFB's
February 18, 1975 identification of the Perth Amboy facility of the
Corporation as a source subject to the regulations promulgated at 40 CFR
Part 61, and AFB's subsequent discovery that the source had failed to file
reports required by 40 CFR §61.10(a). (The history of prior enforcement
actions against this source is discussed in detail, below, in connection
with the rationale this office advances in support of the proposed compli-
ance order.)

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D. Data Upon which Finding of Violation is Proposed to be Made
Discussion of Evidence:

During the course of their May 13, 1975 plant visit, Messrs. Marcus Kantz and Gabriel Marciante, AFB engineers, observed the conduct of several of the company's manufacturing operations, including the formulation of asbestos-content ("asphalt") paint. Associated with the latter operation, they observed company employees engaged in procedures resulting in the generation of dense clouds of asbestos dust which were emitted to the outside air through two doors and a process vent. Their observations are related in greater detail in a memorandum (Kantz to Menczel) dated May 15, 1975. A copy of the referenced memorandum is attached (Tab I).

For present purposes, it is sufficient to note that both EPA inspectors observed visible emissions to the outside air in contravention of the emission standard of 40 CFR §61.22(c)(7). During one phase of the relevant operation, our inspectors watched as 100-pound bags of pure raw asbestos* were emptied into process vats; they found the emissions generated incidental to this phase of the operation to be particularly dense, at times obscuring substantially their view of a contrasting background (see Tab I, page 5).

While 40 CFR §61.22(c) would appear, in proscribing all visible emissions, to set a "reasonable Man" standard, requiring no special training or expertise, Mr. Marciante, a certified smoke watcher, took the precaution of making formal opacity readings in accordance with the procedural requirements of EPA Reference Method 9. These readings were confined to emissions from the throat of a process vent associated with the paint manufacturing operation, which was not the point at which the densest emissions were observed; Mr. Marciante's monitoring of emissions at this point nonetheless resulted in readings as high as 10% in opacity--substantially in excess of the "no visible emissions" standard. (Copies of Mr. Marciante's visible emission sheets are attached as Tab II).

E. Enforcement Action Proposed:

The Enforcement and Regional Counsel Division, Region II, proposes to issue a compliance order pursuant to Section 113(a)(3) of the Clean Air Act. The proposed order (which, along with a proposed cover letter, is attached as Tab III) would require the company to suspend its asbestos paint manufacturing operations until such time as written permission for the resumption of those operations is granted by the Regional Office.

*That these bags did, in fact, contain asbestos was confirmed by Mr. J. Bagnell, a company employee, as well as by Mr. Kantz's three years of experience working with asbestos and the NESHAPS program.

That permission would be granted when the company has either (1) completed the steps necessary to eliminate visible emissions to the outside air incidental to asbestos paint manufacturing operations at the company's Perth Amboy facility, consistent with the requirements of 40 CFR 561.22(c)(7) or, alternatively, has (2) completed, pursuant to the terms of 40 CFR 561.22(f), the installation of an air cleaning device (or devices) satisfying the requirements of 40 CFR 561.23.

F. Rationale in Support of Proposed Order:

It is understood that the action we propose, which could involve a suspension of one of the subject source's many manufacturing operations, represents a departure from previous Agency enforcement policy. We feel that the following considerations support our election of this enforcement option.

- (1) From a public health standpoint, it is undesirable to allow the company to continue asbestos paint manufacturing operations in violation of the regulations while installing necessary control equipment.

In light of the seriousness of the alleged violation, this office believes the company's continued conduct of asbestos paint formulation during the period of time necessary for the installation of necessary control equipment to be inappropriate. The hazardous nature of the pollutant involved is compounded by the density of the emissions observed, and by the plant's proximity to a public thoroughfare and to neighboring commercial and industrial establishments (estimated by Mr. Kantz to be less than 100 yards distant). Although the impact upon the company's own employees may be technically the concern of another federal agency (OSHA), this consideration, too, is properly taken into account when weighing our enforcement alternatives in the face of a detected violation of EPA regulations.

- (2) Minimal impact of proposed shut-down upon the company.

(a) Short period of time involved:

Because of the necessity to comply with relevant EPA and OSHA requirements, the company has already initiated plans for the installation of control equipment which, in the estimation of Mr. Kantz and Mr. Marciante, would be adequate to bring the paint manufacturing operation into compliance with the "no visible emissions" standard. Preliminary design of that equipment (which includes hoods, duct-work, and a bag house) has already been completed. In light of this fact, it is thought that the necessary equipment may be procured and installed by July 1, 1975. This projection is supported by the company's own time estimate (Tab VI).

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(b) Small number of employees affected by shut-down:

During the course of their May 13, 1975 plant visit, Messrs. Kantz and Marciante observed two Celotex Corporation employees engaged in activities relating to the relevant paint manufacturing operation. While acknowledging that perhaps one more employee may be involved in a phase of that operation that they did not observe, it is their opinion that the entire operation involves the part-time services of a maximum of three Celotex employees, for periods aggregating to less than one man-day/day.

(c) Small contribution of paint manufacturing operation to company's profit picture:

EPA's inspectors believe that no fewer than ten, and perhaps as many as twenty, product lines are produced at the company's Perth Amboy plant. A total of three hundred persons are employed at that facility; as indicated above, a maximum of three are engaged on a part-time basis in the relevant paint manufacturing operation. On the basis of this fact, and of their observations during the course of their recent plant visit, our inspectors concluded that the operation involved here is a very small one in the company's production scheme, accounting for a maximum of 5% of the company's dollar volume, and probably considerably less. We therefore project that a one-month suspension of the paint manufacturing operation would have a minimal impact on the company's earnings.

(3) "Scienter"--company's prior knowledge of the existence of relevant regulations:

A substantial body of evidence exists from which we are able to impute to the company prior knowledge of the existence of the regulations codified at 40 CFR Part 61. Although "scienter" is not a necessary element in this case, since we are not presently contemplating initiation of a criminal proceeding, we feel that evidence of the company's prior awareness of the existence of the regulations is relevant as it operates to deprive Celotex of the defense of "surprise," and as it thereby serves to support the appropriateness of the compliance order herein proposed.

On March 17, 1975, an Order pursuant to Section 113(a)(3) of the Clean Air Act, was sent to Mr. J. G. Trontell, Plant Manager of the Corporation's Perth Amboy facility, requiring the Corporation to comply with the reporting requirements of 40 CFR 61.10(a) (Tab IV). Copies of the relevant NESHAPS regulations were attached to that Order.

There is, moreover, conclusive evidence that this did not represent the company's initial contact with these regulations. A March 21, 1975 letter over the signature of Mr. R. E. Rowe, Industrial Relations Supervisor of the company's Perth Amboy plant (attached as Tab V),

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indicates that the company had completed copies of the source report forms required by 40 CFR §61.10(a) on May 23, 1973. It is thus certain that the company was aware of the existence of our NESHAPS regulations on that date, and perhaps earlier. In this context, Mr. Rowe's letter represents an admission against the company's interest, serving to contravert any claim that the company may subsequently make that its noncompliance is attributable to lack of prior notice.

On balance, and on the basis of the facts recited hereinabove, it is the opinion of this office that suspension of paint manufacturing operations at the company's Perth Amboy plant is justified; that the minimal impact that such shut-down will have upon the company and its employees is substantially outweighed by the compelling health considerations presented here. It is believed, moreover, that claims of "surprise" or lack of notice which might dispose the Agency toward leniency in election of appropriate enforcement options may not be made in good faith by the Celotex Corporation.

G. Enforcement Alternatives:

- (1) The company can be ordered to comply by July 1, 1975 without ordering the interim suspension of paint manufacturing operations.

Pro:

This would allow us to secure the company's eventual compliance without risking complaint of financial damage which could conceivably attend our interim shut-down requirement, and without departing from the Agency's past enforcement policies.

Contra:

- (a) The company's continued generation of heavy asbestos pollution during this one-month interim period would make this, in our view, an unacceptable alternative from the public health standpoint.

(b) The fact that it will be required to discontinue the relevant operation until compliance is achieved can be expected to induce the company to complete necessary steps more quickly, perhaps shortening the projected one-month compliance period considerably.

- (2) A civil action may be commenced pursuant to the authority of §113(b)(3) of the Clean Air Act to enjoin the company from continuing the relevant paint formulation operation in violation of 40 CFR §61.22(c)(7).

Pro:

This alternative enjoys the same advantages as the §113(a) (3) administrative order proposed herein, requiring the company to comply, and to discontinue its objectionable activities during the interim period before compliance is achieved.

Contra:

This alternative enjoys no advantages that are not offered by the administrative order approach proposed herein (aside, perhaps, from the advantage offered by judicial imprimatur), and, in fact, would be likely (since it would require coordination with and participation of the Department of Justice and the local United States Attorney's office) to cost us more time in reaching the same end.

(3) A criminal action may be initiated against the company pursuant to the authority of §113(c)(1).

Pro:

The deterrent effect that our successful prosecution of such an action would be likely to have upon sources similarly situated.

Contra:

(a) The evidence that we have to support a claim of "knowing violation" is neither conclusive, nor overwhelming.

(b) Our principal object in the face of such a violation as we are here presented with should be the immediate abatement of the hazardous emissions involved. A criminal action would not directly serve that purpose, and should therefore be thought of as a supplement to, and not in lieu of, an action calculated to serve the desired end.

H. Cost of Necessary Compliance Action (Exclusive of Incidental Costs Associated with Proposed Shut-Down):

The Celotex Corporation estimates that the cost of the necessary control equipment is \$11,900.

I. Recommendation:

It is the recommendation of Region II that the attached Notice of Violation and Order be sent to the Perth Amboy facility of the Celotex Corporation, along with the accompanying cover letter.

J. Documents Enclosed:

- (a) Memorandum, Kantz to Menczel, May 15, 1975 (Tab I);
- (b) Copy of Marcianti's visible emissions data sheets (Tab II);
- (c) Proposed order and cover letter (Tab III);
- (d) Notice of Violation and Order--in the matter Celotex Corporation (Perth Amboy, New Jersey) (March 17, 1975) (Tab IV);
- (e) Letter, R. E. Rowe to U.S. Environmental Protection Agency (March 21, 1975) (Tab V);
- (f) Celotex Corporation--Authorization for Expenditure (Tab VI).

K. Regional Contact:

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